his horn with the intention of overtaking the motor cyclists. Suddenly one of the motor cyclists who, he said, was the plaintiff, swerved out into the road also to overtake the cyclists as a result of which there was a collision between his lorry and the motor cyclist. His speed then was about 20-30 miles per hour.

It is clear from the photographs and the relative dimensions of the two vehicles that the left bumper of the motor lorry came into contact with the seat of the motor cycle and from the sketch plan it is apparent that the accident occurred as a result of the motor cycle coming into the path of the motor lorry. The point of impact judging from the position of the scratch mark was about 5' 9" from the grass verge and if the motor cycle was travelling about 3 feet from the grass verge before the impact it would indicate that the motor cyclist swerved sharply to the right when he was overtaking the cyclists.

As a result of the accident the plaintiff was admitted to hospital on the same day, i.e. 1st October 1963 and was still in hospital on the date of the trial. The injuries that were found on him were a complicated fracture of the pelvis with rupture of the urethra and partial tears of the rectum and the caecum and a lacerated wound 5" long on the right thigh. He had to undergo one operation on admission for the injuries to the bladder and bowel. He also developed a pathological dislocation of the right hip which was still under treatment. Surgery showed that he had a complete rupture of the prostatic urethra and extensive fracture of the pelvis. According to the expert he will be unable to pass urine or motion normally and that another operation would have to be performed on him to make his life more comfortable. The nett results of the injuries are that he is likely to remain impotent and sterile and that even if he is eventually discharged from hospital there is little likelihood that he can even lead a comparatively normal life but the doctor was of the opinion that in view of his sedentary occupation and with proper attention and a second operation he should be able to resume his former job. He would be able to walk with a stiff gait. At the time of the accident the plaintiff was approximately 29 years old and was single. He was employed as a storeman in the telecoms department drawing a salary of $125.28.

On the question of liability I find that both parties were equally to blame for the accident. Among other things the plaintiff swerved out into the path of the motor lorry without ensuring that it was safe to do so and the defendant drove his vehicle too fast under the circumstances. As regards the quantum of damages I have taken into account that the plaintiff has suffered and will continue to suffer severe pain and suffering and that thereafter his prospects will be dreary. He will be unlikely to lead even a comparatively normal life although he would be able to resume his former occupation. He will stand to lose the simple pleasures of life which a normal and healthy person of his age could enjoy and because he will be impotent and sterile he will also lose the opportunity to marry.

Since the special damages has been agreed at $1,691.84 and it has been conceded that there will be no loss of earnings the only question is the award for general damages under the heading of pain and suffering and loss of amenities. There are no decided cases which fall on all fours with this particular case but there appears to be several awards made by Singapore and Malayan courts on separate injuries to urethra, impotency and sterility and shortening of the legs. The reported cases I have referred to are *Lim Cheng Siew* v. *State Advocate-General,*[1] *Liow San* v. *Chai Choo Kim,*[2] *Chua Kim Liang* v. *Teo Kim Ngo* [3] and the *Digest of damages in leg cases.*[4]

On a full measure of damages, therefore, I consider $45,000 to be a reasonable award under the heading of loss of amenities, pain and suffering.

Consequently there will be judgment for the plaintiff against the defendants for $23,345.92, interest at 6% and costs.

Judgment for the plaintiff.

Solicitors: *Murphy & Dunbar.*

QUAH OOI KEAT & ANOR. v. YEW PHAIK HOON

[F.C. (Thomson L.P., Ong Hock Thye Ag.C.J. (Malaya) and Ismail Khan J.) May 15, 1966]

[J.B. — Federal Court Civil Appeal No. 35 of 1966]

Trusts and Trustees — Resulting trust — Transfer of land by nominee to son and stepson of claimant — Whether resulting trust or scheme of family arrangement by claimant's husband.

Advancement — Transfer of land from mother to son and stepson of polygamous Chinese family — Applicability of English authorities.

The plaintiff, the second wife of *Q.H.C.*, claimed a declaration that the first defendent, her stepson, and the second defendent, her own son, who were the registered proprietors of three pieces of land in Johore forming an oil palm estate, were not the beneficial owners but held the oil palm lands as trustees for her.

Q.H.C. became bankrupt in 1932. After his bankruptcy *Q.H.C.*'s business was carried on by the plaintiff's brother *Y.H.E.*, who was also administrator of the estate of the plaintiff's deceased father. On December 27, 1937, *Q.H.C.* transferred the oil palm lands to the Official Assignee and on January 13, 1938, the Official Assignee transferred the land to *Y.H.E.* On October 1 ,1938, *Q.H.C.*'s discharge in bankruptcy became effective. On June 29, 1940, an agreement was signed between the

plaintiff and *Y.H.E.* which recorded that it was thereby agreed that (1) all business of *Y.H.E.* in Kluang and Singapore, the purchases of properties, etc. in the said places were all undertaken on the plaintiff's behalf, (2) all these were then vested and returned to the plaintiff in a satisfactory manner.

Y.H.E. died on November 17, 1944, but had on November 11 1940, executed a transfer of the lands in favour of the defendents. It was admitted that the consideration stated in the transfer was not paid. The documents of title were kept in the office of the Johore Lumbering Co. Ltd.

The Johore Lumbering Co. Ltd. (incorporated in May 1941) was a family company in which all members of the family had shares. All payments in respect of the development of the oil palm lands were made by the company and all income from the oil palms was received by the company. The actual management was in the hands of the two defendants but they drew remuneration from the company. Income tax in respect of the oil palm estate revenue was paid by the company although it was declared to the Inland Revenue as the income of the defendants. The plaintiff claimed that she had given her brother the money to buy the oil palm lands and that the defendants had been appointed only to look after the lands. Azmi J. held that *Y.H.E.* had held the estate as trustee for the plaintiff and that *Y.H.E.* had transferred it to the defendants as trustees for the plaintiff.

The defendants appealed against this decision.

Held: (Thomson L.P. dissenting) on the evidence the plaintiff had failed to prove three things:— that the estate was in fact held by *Y.H.E.* in trust for her and no other, that the transfer to the defendents was at the request of the plaintiff herself, that her motive or intention at the time of the transfer was to substitute the defendants as trustees in the place of *Y.H.E.*

Per Ong Hock Thye Ag.C.J. (Malaya): The creation of a trust must be clear and unequivocal. Words of exhortation by *Q.H.C.* was far from sufficient to impose any trust on the defendents.

Per Ismail Khan J.: I do not think that English authorities, whether on a gift by a mother to a child, or a gift to a stepson, can apply to the affairs of a polygamous Chinese family.

Appeal allowed with costs and order of court below set aside.

Cases referred to:—

(1) *Seawin* v. *Seawin* (1841), 1 Y. & C. Ch. C. 65.

(2) *Warren* v. *Gurney* [1944] 2 All E.R. 472.

(3) *Esso Petroleum Co. Ltd.* v. *Southport Corporation* [1956] A.C. 218.

(4) *Benmax* v. *Austin Motor Co. Ltd.* [1955] 1 All E.R. 326.

In addition the following authorities were also cited in argument:— *The Venture* [1908] P. 218, *Todd* v. *Moohouse* 19 Eg. 69, *Pole* v. *Pole* 27 E.R. 901, *Abingdale* v. *Lappin* [1934] A.C. 491, *Chang Lin* v. *Chong Swee Sang* (1908), Innes 95, *Chan Gun Lai* v. *Lim Chu Kuan* (1911), Innes 126, *Haji Abdullah* [1949] M.L.J. 12, *Assets Company Limited* v. *Mere Roihi* [1905] A.C. 176, *Tsang Chuen* v. *Li Po Kwai* [1932] A.C. 715, *Marshall* v. *Crutwell* 20 Eg. 328, *In re Harrison* 90 L.J. Ch. 156, *Young* v. *Sealey* [1949] Ch. 278 *Standing* v. *Bowring* 31 Ch. D. 282, *Warren* v. *Gurney & Anor.* [1944] 2 All E.R. 472, *Shepherd* v. *Cartwright* [1955] A.C. 431, *Dharmaratna* v. *Dharmaratna* [1939] M.L.J. 310, *Fowkes* v. *Pascoe* 10 Ch. App. 343, *Re De Visme* (1863), 2 De G.J. & Sm. 17, *Down* v. *Ellis* (1865), 35 Beav. 578, *Sayre* v. *Hughes* (1868), 5 Eg. 376, *Bennett* v. *Bennet* 10 Ch. D. 474,

FEDERAL COURT.

Lim Kean Chye (*L. M. Ong* with him)* for the appellants/defendants.

C. H. Smith (*N. N. Leicester* with him) for the respondent/plaintiff.

Cur. Adv. Vult.

Thomson L.P.: This is an appeal in an action of which the subject matter is three pieces of land amounting to a little over 1,000 acres comprised in Johore Land Grants Nos. 17,993, 17,934 and 17,935 which I shall call the oil palm land.

The plaintiff is the second wife of one Quah Hong Chiam. The defendants are her step son, the son of Quah Hong Chiam by his first wife Lim Phen, and her own son by Quah Hong Chiam and they are the registered proprietors of the land in question.

The plaintiff claimed that the defendants held this land as trustees for her and are not the beneficial owners and she asked for a declaration to that effect and for consequential relief. As originally pleaded the defence was a denial of the plaintiff's claim but at the commencement of the trial, some eighteen months after the issue of the writ, this was amended to include averments that the land was given to the defendants by the plaintiff's husband either for himself or with the knowledge and consent of the plaintiff. Alternatively if it was given to them in trust this was done with a view to fraudulent avoidance of the law relating to death duty and income tax.

In the event Azmi J. gave judgment for the plaintiff as prayed and against that judgment the defendants have now appealed.

The story is a confused one and none the easier to elucidate because the witnesses are speaking of events that occurred some twenty-five years ago and that one Yew Hun Eng who would have been probably the most important witness died some twenty years ago. Certain facts, however, are admitted and others are no longer in controversy.

Some time prior to 1932, and certainly from as early as 1917, the plaintiff's husband, Quah Hong Chiam, who like herself is now over eighty, was carrying on business in the timber trade and acquiring interests in land in the State of Johore. He was also, it would appear, carrying on some sort of business in Singapore which was at that time part of the Colony of the Straits Settlements.

In 1932 he became bankrupt, receiving and adjudication orders being made by the High

* The appellants (defendants in the court below) were represented by other counsel at the trial of this case.

Court of the Straits Settlements on 25th November, 1932.

We are not concerned with Quah Hong Chiam's business in Singapore, but after the bankruptcy his timber business in Johore was carried on by the plaintiff and one Yew Hun Eng, who was her brother and the administrator of the estate of her deceased father, under the name of the Johore Lumbering Company. The principal business would appear to have been felling and selling timber growing on the oil palm land in respect of which prior to his bankruptcy Quah Hong Chiam had some sort of occupation rights.

On 2nd January, 1934, Yew Hun Eng borrowed $10,000 from a bank in Penang giving by way of security a mortgage on some houses in Penang the property of the estate of the plaintiff's deceased father, and this money was used for the purposes of the Johore Lumbering Company and on 29th April, 1935, he borrowed a further sum of $3,000 on the same security which was used for the same purposes. These loans were ultimately repaid in full out of the funds of the company. Then on 24th August, 1935, Yew Hun Eng entered into an agreement with the Official Assignee in the Straits Settlements who granted him an irrevocable power of attorney. This agreement is not in evidence but it would appear to have been an agreement for the sale of the oil palm land which at that time was still State land.

Then on 1st October, 1937, Quah Hong Chiam was granted his discharge in bankruptcy suspended for a year and on 17th October, 1937, Grants of the oil palm land in his name were obtained from the State of Johore. The total consideration as expressed in the Grants was $3,055 and I think we are entitled from our own knowledge of the local land laws to say that this money must have been paid to the State by somebody and that there could have been no question of a notional consideration being expressed for the assessment of stamp duty. The quit rents for the first year amounted to about $500, a fact which may explain certain discrepancies in the evidence. On 27th December Quah Hong Chiam transferred the land to the Official Assignee and on 13th January, 1938, Yew Hun Eng as attorney of the Official Assignee under the power of 24th August, 1935, transferred the land to himself.

On 1st October, 1938, Quah Hong Chiam's discharge in bankruptcy became effective and the following year cultivation of oil palms was commenced on the oil palm land which had by this time been cleared of timber.

Some time in 1940 Yew Hun Eng returned to Penang where he died on 17th November, 1944. But on 29th June, 1940, before he left Johore he and the plaintiff executed an agreement. That recited that Yew Hun Eng owed the plaintiff $6,000 being money which she had since 1934 paid to the bank in Penang by way of interest on the money Yew Hun Eng had borrowed on mortgage. It then recorded that:—

"It is hereby agreed that

1. All businesses of Yew Hun Eng in Kluang and Singapore, the purchases of properties, etc. in the said places were all undertaken on Yew Phaik Hoon's behalf.

2. All these are now vested and returned to Yew Phaik Hoon in a satisfactory manner."

A few months later, on 9th November, 1940, Yew Hun Eng executed a transfer of the oil palm land in favour of the defendants. The consideration expressed in the transfer was $36,000 but it is admitted that this was for purposes of stamp duty and no money was paid. The transfer was registered but the documents of title, and this is admitted by the defendants, in some way came into the possession of the plaintiff who retained them. And there is no evidence that they have at any time been in the possession of either of the defendants.

In addition to the oil palm land the properties controlled by Quah Hong Chiam include a sawmill elsewhere, a rubber estate which was ostensibly owned by the plaintiff, a brickworks and some houses. And of course there was still the timber business although the oil palm land, after it had been cleared of timber and planted with oil palms, was less intimately connected with the timber business.

Some time in May, 1941, a limited liability company called the Johore Lumbering Company was formed to deal with these various undertakings. In this there were 96 shares which were distributed amongst the family. Quah Hong Chiam held 24 shares, the plaintiff and the first wife held 12 shares each, seven of his eight sons, including the first defendant held 7 shares each, the second defendant, his other son, who had contributed some money of his own, held 10 shares, the remaining shares were held by other relatives and clansmen.

After the incorporation of the company all payments in respect of the oil palm land were made by the company and all the income from it was received by the company. The actual management was in the hands of the two defendants but they drew remuneration from the company and income tax in respect of the oil palm land revenue was paid by the company although it was declared to the Inland Revenue as the income of the defendants. From 1948 till 1957 the oil palm land was charged to the Industrial Rehabilitation Finance Board to secure a loan of $100,000 of which half was used for the purposes of the company and half remained in the bank and it is significant that when this loan was repaid and the charge to the board discharged there is no evidence of the defendants

having attempted to secure the return to themselves of the title deeds of the land.

It is not clear just when differences arose between the parties but on 11th December, 1959, the defendants registered the "business carried on under the name Gim Tien Oil Palm Estate" and the writ in the present proceedings was issued on 5th November, 1962.

At this stage it will be desirable to pass from the facts of the case that appear to be tolerably clear from the documentary evidence to the more controversial parol evidence that was given as to the transfer of the oil palm land to the defendants, a transfer which of course made them registered proprietors with an indefeasible title by reason of the provisions of the Johore Land Enactment.

The plaintiff, an illiterate blind woman now over eighty years of age, very candidly admitted that she did not know or did not remember very much about the business and that everything had been arranged by her husband, Quah Hong Chiam, and her brother, Yew Hun Eng.

Money was borrowed from the bank in Penang on her behalf by Yew Hun Eng who was the administrator of her deceased father's estate but the arranging was done by her husband. Before the war she owned the Johore Lumbering Company but she did not know if her husband had a share in it. Before the war she purchased land including the oil palm land. She gave her brother money to buy the land and he bought it from the Official Assignee. The land was originally jungle but eventually it was planted with oil palms, the money for this coming from the Johore Lumbering Company. Before her brother returned to Penang he appointed the two defendants to look after the oil palm estate that was then coming into existence as such and which she regarded as her property. She did not intend to give the land to the defendants as a gift. Why should she do so, she had other children and in any event the first defendant was only a step-son? She did not at any time authorise her husband to give the oil palm land to the defendants, and nobody told her the land had been transferred to them. She first knew about the transfer just before the commencement of the present proceedings in 1962. She was cross-examined at length but though she was clearly reduced to a state of confusion and it became very clear that her recollection of the events of which she spoke was very imperfect and that throughout she had been content to leave the management of all business matters to her husband and her brother, nevertheless she insisted to the end that her husband used the money borrowed by her brother on the security of her father's estate for the purposes of the family business and that the oil palm land was bought with what she regarded as her money.

Quah Hong Chiam, himself 81 years of age, said that he "owned" the oil palm land before he was made bankrupt. By "owned" he clearly meant that he had some sort of occupation rights. After he became bankrupt the land was bought by the plaintiff's brother out of money he had borrowed as administrator on the security of the plaintiff's father's estate. Later when Yew Hun Eng returned to Penang the land was transferred to the defendants because they were to look after it. The land was cultivated by the Johore Lumbering Company and most of the cultivation was done after the War, that is after the company had been incorporated. There was no reason why he should give the land to the defendants, after all he had six other sons and all his sons including the defendants were shareholders in the company. The land was not transferred to the plaintiff because she was a woman and "did not know the affairs of the jungle". After the war a loan of $50,000 was raised on the land and this money was paid into the account of the company which spent the money and kept the profits. The company paid the quit rents on the land and income tax on the profits and he himself prepared the income tax returns.

This evidence was not materially shaken in cross-examination. The main additional fact elicited was that at all material times the actual management of the oil palm land had been in the hands of the defendants. But the witness adhered to his position that the profits of the oil palm land were at all times treated as profits of the company.

The other witness for the plaintiff was Quah Ooi Chim, her son by Quah Hong Chiam, who had been secretary of the Johore Lumbering Company since its incorporation and who had previously managed it during his father's bankruptcy during which time he regarded it as the business of his mother. His evidence supported that of his father and mother. The money to purchase the oil palm land was provided out of the money borrowed from the bank in Penang and by his mother out of her savings. He himself was the registered proprietor of some land in Kluang but he did not regard it as his own property but that of the company. The oil palm land was put in the names of the defendants because they were managing it and the younger brothers were still at school. At no time had the defendants received any profit as such from the oil palm land though they had been maintained by the company nor had they paid any quit rents as assessment in respect of it.

Both the defendants gave evidence.

The first defendant said he and the second defendant were the proprietors of the oil palm land and there was no trust of any sort. His

father had some sort of occupation rights in the land before his bankruptcy. Then during the bankruptcy the land was purchased from the State in his own name by Yew Hun Eng in whose name his father was carrying on business. After his discharge his father transferred the land to himself and the second defendant. His father told him he had done so while they were travelling in a car. He understood that his father was giving him the land because he was experienced in cultivation and when his father died he would have to look after it and maintain an aged grandmother. He knew about the loan from the Industrial Rehabilitation Finance Board for which he had signed the application at his father's request. It was actually $100,000 but of this $50,000 remained in the bank and was never used. The balance of $50,000 was given by him to the Johore Lumbering Company whom he regarded as agents for the Gim Thien Oil Palm Estate (the business name which he and the second defendant later registered) and was ultimately repaid by the company to the board. He personally had never contributed anything to the Lumbering Company and he had paid nothing for the shares he received when it was incorporated. He had not received any of the profits from the oil palm estate but he had been maintained by the company and the company had paid his income tax though he had been assessed in his own name.

The evidence of the second defendant was similar. During the bankruptcy his father had carried on business in the names of a number of people including himself. During that period his uncle Yew Hun Eng came from Penang and managed his father's sawmill at Kahang and while doing so bought a number of pieces of land including the oil palm land with money provided by his father. He himself did most of the work of managing the Johore Lumbering Company and he started cultivating oil palms on the oil palm land in 1939. In 1940 his father asked Yew Hun Eng to transfer the oil palm land to the first defendant and himself. His father had told him he was worried about the oil palm land as it was still in Yew Hun Eng's name and the latter did not wish to transfer it. His father said he wished to transfer the oil palm land to the first defendant and himself as he has already given three houses to their brother Quah Ooi Chim.

When the Johore Lumbering Company was incorporated all the family were given shares in it. It became the agent for the oil palms estate. It collected the receipts from the sales of oil and paid all wages and credited the oil palm estate with rent. The loan from the Industrial Rehabilitation Finance Board was paid to the company and the repayment was debited to the oil palm estate.

Before departing from the evidence two observations fall to be made.

There was a great deal of evidence, of which it has not been considered necessary to dissect the details but which was never really denied, that from time to time pieces of land were acquired during Quah Hong Chiam's business career which would appear to have been regarded as family property but which were registered in the names of individual members of the family. Some houses were registered in the name of Quah Ooi Chim, some rubber land was registered in the name of the plaintiff, some town land was registered in the name of Quah Hong Chiam's principal wife Lim Phen.

Then there were various references in the evidence as to the way various matters were dealt with in the accounts of the Johore Lumbering Company both before and after its incorporation. But although two books of account were put in evidence no attempt was made by counsel on either side to draw their contents to the attention of the trial judge or to base any argument on their contents. In the circumstances the judge, in my view wisely, refrained from examining their contents and for myself I have followed his example. Nothing would be more likely to produce wrong results than for a judge to embark on a private examination of a set of commercial books without assistance. The books were there and witnesses who said that certain matters were treated in certain ways should have been invited to indicate the particular entries which they considered supported what they had said.

Azmi J. dealt with the case in a long and careful judgment. He considered the evidence in some detail and said:—

> "I find from the evidence as a whole that so far as dealings with Government departments were concerned, the property in dispute had been regarded as that of the registered owners, but on the other hand none of the defendants enjoyed the income as their own separate income until the dispute arose about this property, and all the debts due to the Government, for example income tax, were paid out from a common fund of the family."

He then went on:—

> "In so far as the oil palm estate is concerned, I hold the view on the evidence before me that it was bought from the Official Assignee by Yew Hun Eng on behalf of the plaintiff, and Yew Hun Eng, therefore, held the land merely as trustee for the plaintiff. He continued to look after the land until he decided to return to Penang. Because Yew Hun Eng was to look after the property the land was registered in his name. There seemed to be an idea in the family that the land must be registered in the land office in the name of whoever was to look after the property. On the facts of the case, therefore, I accept the evidence of the plaintiff, her husband and her eldest son that when this property was transferred to the two defendants after the departure of Yew Hun Eng to Penang, the two defendants were to hold the property in trust for her."

He then proceeded to find that even if the object of the transaction was to effect some sort of fraud on the Government in connection with

death duty that fraudulent purpose had not yet been carried out, all the parties being still alive, but that in any case there was never any intention to effect any fraud in connection with either death duty or income tax. And with regard to income tax I would pause here to observe that it is difficult to understand why that particular fact was ever raised in view of the fact that income tax was unknown in this country before 1947. Since that date it is impossible to say whether or not the income tax has been defrauded but nothing of the sort could have been contemplated in 1940.

Coming to my own views of the case I would make the preliminary observation that here we encounter the recurring difficulty of applying an alien system of law to the affairs of people who through ignorance of its nature conduct their affairs in disregard of it. In particular they regard a "business" as something having a legal existence of its own, irrespective of whether its assets are in the eyes of our law owned by an individual or jointly by partners or by a limited liability company. When things go well, and they generally do go well, no harm is done but when disputes arise and they have recourse to the courts the difficulties of ascertaining the rights of individuals can become formidable.

Apart from the legal framework of the present proceedings it is clear that it is the basic position of the plaintiff and her husband that everything connected with the various enterprises in which they are concerned belongs to their family, that Quah Hong Chiam as head of the family has the final say in dealing with these enterprises and everything connected with them and that the defendants are trying to obtain more than their fair share of the family property, and to acquire it prematurely. The real question to be decided is whether or not law and equity as we know them as applied to such facts as emerge from the evidence produce results consonant with that attitude.

For myself I would attach little value to the evidence of the parties. It relates to events which occurred 25 years ago and is distorted by the ordinary frailty of memory and by family quarrels regarding which much has been hinted but little has been said. Moreover Yew Hun Eng whose evidence could have thrown much light on the matter has long since died.

It was the plaintiff's case that the land was bought by Yew Hun Eng in his name out of her savings and money borrowed on the assets of her father's estate of which she was a beneficiary. She left the entire management of her affairs to her husband and he transferred the land into the names of the defendants as a matter of convenience for the management of the family property. Why should any special provision have been made for the defendants when no special provision was made for the other members of a large family? It may be that her rights are not absolute, that is a matter which may arise in subsequent litigation, but on her view of the facts she is clearly entitled to a declaration as against the defendants that so far as the land is concerned they are bound by a trust in her favour, though of course there can be no question of any equitable rights in the land.

The defendants' case is that even if Yew Hun Eng held the land as a trustee for the mother the evidence made out that the father had the mother's authority to give it to them as a gift so as to provide for them when he was no longer able to control the family property. But in any event Yew Hun Eng held the land not as trustee for the mother but for the father and so they are entitled to pray in aid the presumption of advancement.

Here I would say that I am not overlooking the presumptions that arise in the matter. Yew Hun Eng was himself affected by a trust and on the transfer by him to the defendants without consideration there was a presumption that in relation to it they were subject to a trust in favour of the person for whom Yew Hun Eng held it in trust. If that person was the plaintiff that presumption operated alone though of course if that person was her husband then the presumption of advancement operated *per contra* in favour of the defendants.

For myself I would say that the evidence is so nicely balanced as to entitle the defendants to succeed if it were not for three considerations which to my mind definitely swing the balance of probability in favour of the plaintiff.

In the first place, on the basis of credibility the trial judge clearly preferred the evidence of the father and the mother to that of the defendants. In a case of this nature that may not be of paramount importance but still the plaintiff is entitled to the benefit of it.

In the second place there is the significant fact that the transfer to the defendants was before and not after the incorporation of the Johore Lumbering Company and yet the defendants were given the same share in that company as the other sons for whom no special provision had been made.

And in the third place there is the matter of the possession of the title deeds, the grants issued by the State of Johore.

There is no suggestion that those deeds have at any time been in the possession of either of the defendants though they must have been presented to the Land Office when transactions in relation to the land had to be registered. For many years they were in the possession of the

plaintiff. Then they were kept with the papers of the Johore Lumbering Company at Kluang and they have been produced in the present case as the plaintiff's documents.

To my mind this is the circumstance to which considerable weight should be given. *Seawin* v. *Seawin* [1] was a case where a father had bought shares in the name of his son but had retained the share certificate. It was argued that the well-known presumption of the purchase by the father in the name of his son was a gift by way of advancement applied but Sir J. L. Knight Bruce V.C. said (at p. 67) :—

"The father may certainly, even in cases where the doctrine of advancement is held to take place, receive the title-deeds and the dividends; but although those circumstances may exist in such cases, yet they are circumstances in favour of the father, especially where the son is adult."

A hundred years later, in the case of *Warren* v. *Gurney,*[2] the court was concerned with a house which had been bought by a father in the name of his daughter but the title deeds of which had been retained by the father. Here, again, the question of advancement arose and Morton L.J. said this (at p. 473) :—

"The second contention put forward by counsel for the appellants was that, on the admissible evidence, the judge was not justified in coming to the conclusion that the defendants had rebutted the presumption of advancement. In my view, there was ample evidence to justify that conclusion of the judge. In the first place, there is the fact that the father retained the title deeds from the time of purchase to the time of his death. I think that is a very significant fact, because title deeds, as it was said in Coke On Littleton, are '*sinews* of the land'. One would have expected the father to have handed them over, either to the plaintiff or her husband, if he had intended the gift."

In all the circumstances of the case I would dismiss the appeal.

Ong Hock Thye Ag.C.J. (Malaya): The appellants are a stepson and one of the sons of the respondent and this appeal is against the decision of the High Court in Johore declaring that three pieces of land, registered in their names since November 18, 1940, were held by them as trustees for the respondent, and ordering that they transfer the said lands to the respondent and pay the costs of the action. I shall refer to the respondent and the appellants hereafter as the plaintiff and first and second defendants respectively.

The plaintiff, Yew Phaik Hoon, is an illiterate woman and the wife of Quah Hong Chiam who owns considerable valuable property situate mainly in Singapore. They are both over 80 years old. Quah Hong Chiam has another wife, Lim Phien, who resides in Kluang, Johore. By these two wives he has 8 sons and 7 daughters. The first defendant is the only natural son of Lim Phien (another being adopted) and the second defendant is the second son of Yew Phaik Hoon, the eldest being Quah Ooi Chim, a witness for the plaintiff.

The history of this case goes back over 30 years, when Quah Hong Chiam was doing business in a comparatively small way. Before he went bankrupt in 1932 he was already in possession, as approved applicant, of three pieces of State land in Johore, containing a total area of 1,021 acres 3 roods 20 poles, all of which was forest. To exploit this grant he was operating the Moh Seng Sawmill, in partnership with two kinsmen, since special conditions of the grant had required that all hardwood timber should be extracted by him before the jungle was burnt and the land used for cultivation of West African oil palm. This had since been fully accomplished, with the result that the land is now a valuable oil palm estate.

Though bankrupt, Quah Hong Chiam had then a large family to support and he remained undischarged until 1938. Of course his business capabilities did not lie fallow in the meantime and he in fact resumed the lumber business with funds raised from a bank through his son, the second defendant. From the ashes, as it were, of Moh Seng rose, first, the Kluang Sawmill and the Kahang Sawmill, then the Johore Lumbering Co., and, about the same time also, a brickworks. Being unable to trade or carry on business in his own name, he had to do so through nominees. In all cases the nominee who lent his name was his brother-in-law, Yew Hun Eng, who was brought over to Johore from Penang in 1935. Yew Hun Eng was Yeoh Phaik Hoon's brother, who was administrator of their father's estate. He returned to Penang in 1940 — two years after Quah Hong Chiam was discharged from bankruptcy — and died in November 1944.

Soon after Yew Hun Eng came to Johore, he negotiated and bought over in his own name from the Official Assignee all the properties of the bankrupt. They included the lands to be cultivated with oil palm, for which the price paid was only $600 under an agreement dated August 24, 1935. On March 27, 1938, the transfer of these lands from the Official Assignee was registered in the name of Yew Hun Eng, who, on November 9, 1940 executed a transfer thereof to these defendants for the consideration therein expressed of $36,000. This transfer was registered on November 18, 1940, and the defendants are still on the register as proprietors.

In her statement of claim the plaintiff stated that Yew Hun Eng held the said lands in trust for her, that he transferred them on November 9, 1940 at her request to the defendants, who have since held them as trustees, and that no consideration in fact passed from them to her, notwithstanding the recital of $36,000 as having been paid.

In the further particulars delivered it was stated that the request to Yew Hun Eng was oral, that the alleged trust was created upon the acceptance by the defendants of the transfer of the property into their names and that the trust was oral and the request to them was made about the time of the transfer and before it was completed.

By their defence the defendants admitted that no consideration passed from them to any person for the transfer, but they denied the alleged trust and claimed to be beneficial owners. They further denied that the transfer was made at the request of the plaintiff and contended that the property was given to them by Quah Hong Chiam as his own, or if not, it was knowingly treated as the property of Quah Hong Chiam by the plaintiff who agreed to the transfer. It was also further contended that the transfer was made as part of several dispositions of property to various members of the family of Quah Hong Chiam. Finally, there was a plea of illegality which, in my view, does not fall to be considered.

The trial judge, on the evidence, found that

> "so far as dealings with Government departments were concerned, the property in dispute had been regarded as that of the registered owners, but on the other hand none of the defendants enjoyed the income as their own separate income until the dispute arose about this property, and all the debts due to the Government, for example, income tax, were paid from a common fund of the family".

After considering the evidence on both sides he came to the conclusion that Yew Hun Eng had bought the palm oil lands on behalf of the plaintiff and, therefore, held them as trustee for the plaintiff; that because Yew Hun Eng was to be in charge thereof the property was registered in his name; that

> "there seemed to be an idea in the family that the land must be registered in the land office in the name of whoever was to look after the property";

consequently, he accepted the evidence of the plaintiff, her husband and eldest son, Quah Ooi Chim, that when the property was transferred to the defendants after the departure of Yew Hun Eng to Penang, they were to hold the property in trust for her.

This decision, plainly, was based on the judge's inferences from primary facts. The primary facts, however, were not stated. In considering the validity of the inferences I think it is essential to ascertain what were the primary facts found.

A simple analysis of the statement of claim shows that, in order to succeed, the plaintiff must prove, first, that the said lands were in fact held by Yew Hun Eng in trust for her and no other; secondly, that the transfer was at the request of the plaintiff herself; and thirdly, that her motive or intention at the time of the transfer was to substitute the defendants as trustees in the place of Yew Hun Eng and not to benefit them personally.

With regard to the above three points, certain essential primary facts had to be considered. I shall confine myself to facts not in dispute, whether by admission or otherwise. It is undoubtedly true to say that, quite apart from being totally illiterate, the evidence clearly establishes that the plaintiff "knew nothing about business"; in the words of Quah Ooi Chim. This is strengthened by her own admissions. As regards the source of her funds for the purchases from the Official Assignee, she alleged that she obtained a loan in 1935 from the Penang branch of the Oversea-Chinese Bank. Yet she admitted, "I don't know who made the arrangement but my husband knew about it. I did not take part in the dealing . . . . Please ask my husband and my son". In fact the bank loan was granted to Yew Hun Eng, not the plaintiff. She did not know how the loan was utilised; one had to ask her husband. Of the Johore Lumbering Co., supposed to belong exclusively to her, she said: "I don't know if my husband had any share in the Johore Lumbering Co. before it became a limited company. Please ask my husband and son". Of the oil palm estate to which she lays claim as sole beneficial owner, she did not even know when the oil palms were planted, nor anything regarding the post-war loan given by the Rehabilitation Board, which was used to restore the estate after the years of neglect which supervened while Malaya was under Japanese occupation; she did not know that the defendants were registered as owners of this estate under the Registration of Business Ordinance; she never looked into the books and her husband had at his absolute disposal all her profits from the estate; she did not even take the profits because she "did not bother".

It is again true to say that Quah Hong Chiam at all times had the management and control of all his wife's affairs, virtually as though he were the true owner of every piece of property of which she was alleged to be beneficial owner. There is not an iota of evidence to the contrary.

Piling *Pelion* on *Ossa,* the most important and conclusive fact is this admission, in her own words:

> "I came to know from people that the lands in question were in the names of the two defendants just before the issue of the writ of summons. I did not transfer the lands to the defendants nor did I permit any person to do so. My brother never consulted me about transfer of this property to the defendants. He never told me he had transferred the land to the defendants."

Nowhere in the judgment does it appear that this admission was considered by the learned trial judge.

This admission, in my opinion, is fatal to the plaintiff's claim because, firstly, Yew Hun Eng could not have held the lands as trustee for her if he could dispose of her beneficial interest otherwise than on her directions and in breach of trust; secondly, the transfer was not made by Yew Hun Eng at her request as alleged since she personally knew nothing about it till 1962; and thirdly, the fact that she knew nothing of the transfer for over twenty years necessarily contradicts her allegation that the transfer was to the defendants merely as trustees, with no intention to benefit them personally.

From this admission and the evidence as a whole, I think there can be no doubt that Yew Hun Eng transferred the lands at the behest of Quah Hong Chiam. It is to be observed that there is no allegation of any breach of trust against Yew Hun Eng. As Quah Hong Chiam managed all the plaintiff's affairs and she was ignorant of the transfer, it must have been carried out pursuant to instructions from no other than Quah Hong Chiam.

Since he, in all but name, possessed all the powers and privileges of ownership, whereas the plaintiff had none, I think the truth is that Yew Hun Eng held the lands in trust for Quah Hong Chiam rather than the plaintiff, whose beneficial ownership was a mere fiction serving to provide shield for the bankrupt.

In support of her claim the plaintiff had alleged that the purchase moneys came from her. She said:

"The money spent on buying land was my own money. I bought it for $600. It partly came from my mother and partly from my old jewelleries."

I very much doubt that she used her own moneys when all other property but this had allegedly been purchased with the bank loan. Nevertheless, even assuming this to be true, I fail to see how that fact *per se* is at all material to the question: for whom did Yew Hun Eng hold the land as trustee? Providing the purchase moneys did not *ipso facto* make Yew Hun Eng a trustee on her behalf unless there is unambiguous proof — of which there is none — strong enough to displace the abundant evidence on the record that Yew Hun Eng was a mere tool and false front for the bankrupt.

It was the plaintiff's case that, for all the purchases made from the Official Assignee, except the palm oil lands, the moneys had been borrowed by her from the Oversea Chinese Banking Corporation on the security of property belonging to her deceased father's estate, and that she must be considered the true owner, for no other reason than that the purchase moneys came from her. In my view the plaintiff's story does not bear scrutiny. She was never a debtor of the bank.

The truth is that the bank gave to Yew Hun Eng, as administrator, two loans of $10,000 and $3,000 secured by a first and second mortgage of three Penang houses belonging to the estate of Yew Say Kheng, deceased, who died in July 1930. The first indenture (Ex.D11) was dated January 2, 1934, and in the recital thereof it was stated that the loan of $10,000 was necessary in the course of administration of the testator's estate. The second mortgage to the bank (Ex.D12) was executed on April 29, 1935. It was redeemed (see Ex.P1D) by repayment of $3,000 to the bank on September 30, 1937, leaving only the first mortgage outstanding. By an indenture dated May 12, 1941 the bank transferred this mortgage to Quah Hong Chiam upon his paying off the debt due by Yew Hung Eng (see Ex.D14). Quah Hong Chiam himself was repaid on February 28, 1956 by the administrators *de bonis non* of the estate of Yew Say Kheng, twelve years, after the death of Yew Hun Eng, (see Ex.D15).

It cannot, therefore, be true that the first loan of $10,000 was utilised for Yew Hun Eng's purchases from the Official Assignee. Otherwise, upon repayment of this loan to the bank, there should be no reason for Quah Hong Chiam becoming mortgagee in place of the bank, nor for him to be paid off in 1956.

As to the $3,000 secured on the second mortgage, this had been repaid before Quah Hong Chiam's discharge, while Yew Hun Eng was still nominally owner of all the enterprises he held as trustee. If this sum was in fact used for the benefit of the bankruptcy, then Yew Hun Eng, as the mortgagor, had himself seen to the repayment and that was the end of the matter. In any event, even if the moneys were used for the purchases, there was not a scrap of evidence that they were advanced by Yew Hun Eng to the plaintiff, or that she made herself personally responsible for the repayment. On the contrary, there was ample evidence that it was Quah Hong Chiam who was the debtor, if he in fact received any moneys from Yew Hun Eng at all. He wanted funds to re-establish himself in business and he succeeded in doing so. Yew Hun Eng in those circumstances must be held to have made the advance to Quah Hong Chiam at his request since he was active in the negotiations with the bank. There was never any pretence on the part of Quah Hong Chiam or his son Quah Ooi Chim, that during the former's bankruptcy, he was not carrying on business as usual, although in the name of Yew Hun Eng. Furthermore, upon his discharge, he should have had no assets of his own. As Quah Ooi Chim said:

"He had not even one cent interest in the Johore Lumbering Co. When he ceased to be a bankrupt he had nothing at all. Whilst he was bankrupt, all (was) done by nominees."

Nevertheless, Quah Hong Chiam in cross-examination was unable to deny that, after his discharge from bankruptcy he was able to take over the Johore Lumbering Co. from Yew Hun Eng as his own — there is no evidence or suggestion that he ever bought it back from his wife — and he then proceeded to convert it into a limited company and to distribute shares therein to members of his family. If this concrete instance is proof of anything, surely it is proof that the Johore Lumbering Co. was at all times held by Yew Hun Eng in trust for Quah Hong Chiam, and not the plaintiff. Since this main enterprise was in reality Quah Hong Chiam's what other inference can be drawn except that its subsidiary, the oil palm estate, was equally his?

In my opinion a finding on the true ownership of the Johore Lumbering Co. is again sufficient to decide the issues in this case. Ever since the palm oil estate was transferred to the defendants in 1940 they had not spent a cent of their own on its development. Neither, for that matter, were they ever out of pocket in any way. From the very beginning the Johore Lumbering Co. supplied the development funds. The company also subsequently took the profits. Until shortly before this litigation the defendants only drew such moneys as they required and left the balance of profits at the disposal of their father. Apparently the learned trial judge considered these facts consistent with the alleged trust, and he went on to accept the plaintiff's explanation that the transfer was purely because Yew Hun Eng was leaving Johore to reside permanently in Penang. With all respect I do not think this reason was plausible enough. Even though he was going back to reside permanently in Penang, Yew Hun Eng for all necessary purposes could have given to both or either of the defendants a power of attorney. He had given one to Quah Ooi Chim on September 27, 1935 (see Ex.P10). Hence he could not have been unaware that a transfer was wholly unnecessary merely to invest them with powers of management. Why not a transfer to the plaintiff herself, had she been the true beneficial owner? Why not to Quah Hong Chiam himself who actually held the reins? He had already been discharged from bankruptcy for two years and was no longer incompetent to accept the transfer in his own name.

Furthermore, what evidence is there of the trust? The plaintiff herself knew nothing of the transfer. Quah Hong Chiam had merely this to say:

> "Plaintiff being a woman did not know the affairs of the jungle. As her brother wanted to go to Penang the land was transferred to defendants. I told them to look after the property. I did not tell them that the land was to be transferred to their names before the transfer and (or?) even after. I told them to look after the land after the transfer. I told them that both of them should look after the property continuously."

In my view these words are far from sufficient to impose any trust on the defendants. To derogate from the grant, which resulted from an absolute transfer, the creation of the trust must be clear and unequivocal. Were the exhortations of Quah Hong Chiam in any way inconsistent with a gift of lands which at the time were of negligible value?

It is true that Quah Hong Chiam, through the Johore Lumbering Co., financed the development of the estate as the defendants had no means of their own. After the estate began to show a profit I do not think it unnatural or unreasonable that the defendants were content to let their father recoup himself what he had spent in the past. The income was theirs not only to spend on themselves, but also to give away. Because they allowed their father to take the income it does not follow that their title to the estate was in jeopardy. They both had shares in the Johore Lumbering Co. and they had drawn on the company for all their requirements without let or hindrance. All this is not inconsistent with a gift of the estate by their father in 1940. Therefore, it seems to me that Quah Hong Chiam had second thoughts only after the estate had become very valuable property. Hence for the past ten years he, but not the plaintiff, had been trying to persuade the defendants to make a retransfer. He did so because he thought himself morally entitled to have the property returned. To quote his own words:

> "If both the defendants were of right mind, they cannot claim this as theirs because I and others physically worked the estate. I bought the oil palm plants and also I did so much work on it".

This seems to me the true basis for his claim. His state of mind today, as so revealed, is proof of what it was in 1940. He must have thought at the time that the defendants would never presume to disobey his every behest at a future date. In that belief he must have thought that, by making the transfer he could save payment of estate duty on his death, while, in his lifetime, he retained the advantage of enjoying all the profits and he could count on the defendant's implicit obedience in distributing the property according to his wishes. As it turned out, in this expectation he was wrong. Above all, I think it should be remembered that, when the transfer was executed by Yew Hun Eng in 1940, there was no evidence that Quah Hong Chiam had ever taken any legal advice on how to create a trust. To an unlettered and untutored Chinese merchant who knows no English the alien concept of a trust must surely have been an unknown mystery. How then could he have created something of the very existence of which he was ignorant? Had he consulted solicitors the execution of a trust deed would have been inevitable. The very fact that there was no such instrument is in my view conclusive

proof that he never took advice, and having failed to do so, it was impossible for him to have created any oral trust as alleged, even assuming that he was acting on the plaintiff's behalf in causing the transfer to be made.

Finally I think there was ample evidence to support the defendants' contention that the palm oil lands were a gift which took place at or about the time when the members of the family shared in a distribution of property by Quah Hong Chiam. First, a house No. 7 Jalan Pasar, Kluang, held under Grant 2536 (Ex. D.2) was transferred by Yew Hun Eng to Lim Phien on November 16, 1938. The premises were originally the property of Quah Hong Chiam and bought by Yew Hun Eng from the Official Assignee. Quah Hong Chiam admitted that these premises now belong to Lim Phien beneficially. Secondly, three houses in Jalan Mersing, Kluang, which were built from funds of the Johore Lumbering Co. were and still are registered in the name of Quah Ooi Chim who said: "On the death of my father the houses are mine legally", though he went on to state that he held them subject to directions from his mother as to their disposal. Thirdly, an estate in Kluang, known as Yeoh Phaik Hoon Rubber Estate, which originally was the property of Quah Hong Chiam and was purchased from the Official Assignee, is now registered in the name of the plaintiff as owner. Fourthly, the second defendant stated in his evidence, which was uncontradicted, that five pieces of padi land were put in his name as a gift of Quah Hong Chiam and no claim has yet been made for their return. Fifthly, the evidence of the first defendant, also uncontradicted, disclosed that 6 acres of land were given to his adopted brother in 1940, of approximately equal value to the three pieces of jungle land transferred to himself and the second defendant. Lastly, shares in the limited company were distributed to every member of the family.

For the various reasons stated above I need only mention, in passing, that I do not consider the agreement of June 29, 1940 (which was relied on by the plaintiff as evidence of the alleged trust) of any value towards establishing her case. As plaintiff she had failed miserably to discharge the onus which lay on her.

I would allow this appeal, with costs here and in the court below, and set aside the order dated March 31, 1965.

Ismail Khan J.: I have had the advantage of reading the judgments of the Lord President and Ong Ag.C.J. Since they have arrived at different conclusions it falls on me to express my own independent opinion.

There are two preliminary observations which I should like to make for a start. First, I think that it is as important in this case as in *Esso Petroleum Co. Ltd.* v. *Southport Corporation*,[3] that the issues should be determined strictly according to the pleadings and particulars delivered. If this is lost sight of, as the Court of Appeal did in the *Esso* Case, then there arises the possibility of error. As Lord Radcliffe said,

> "If an appellate court is to treat reliance upon them as pedantry or mere formalism, I do not see what part they have to play in our trial system."

Later, he observed,

> "In my view, where the question is, as here, as to the sufficiency of evidence, the state of the pleadings is of more importance than the way in which the case is shaped in argument."

Secondly, I think that the distinction between specific findings of fact and findings which are inferences from specific facts found must be borne in mind. Where the trial judge arrived at findings which are really inferences from primary facts, it is important to know what those primary facts were, since the validity of such inferences needs to be tested by the grounds which form their basis. If this is done the appellate court can readily see either that the inferences are irresistible or that there are flaws of reasoning which had escaped attention. This is especially necessary where there is a conflict of evidence and the evidence of one set of witnesses is preferred to that of the other. Where, on the other hand, grounds for the inferences are not forthcoming, one may be forgiven for thinking that they are founded on nothing more substantial than superficial general impressions which, of course, are easily liable to error. In this connection I would refer to the observations of their Lordships in *Benmax* v. *Austin Motor Co. Ltd.*[4]

Having made these observations I turn now to the present case. I do not propose to set out the whole of the relevant facts since this has been done with care and precision by Ong Ag.C.J.

I shall deal first with the plaintiff's case according to her pleadings. By her statement of claim the plaintiff of course undertook to discharge the onus of proof that the palm oil lands were held in trust for her by her brother Yew Hun Eng until the 9th November, 1940 and that on that date the properties were transferred by him to the defendants as trustees for herself. In the further and better particulars delivered, it was alleged that originally "the trust was created in or about August 1935 as the result of an oral agreement between Yew Hun Eng and Yew Phaik Hoon." From the record, however, I can find absolutely nothing to that effect in the evidence of the plaintiff herself. As she had nothing to say on this point I do not see how either her husband, Quah Hong Chiam, or her son, Quah Ooi Chim, could repair the omission by supplying corroboration as to a transaction of which, she as a party, was unable to say a

word in support of the fact alleged in the particulars. Next, as to the "written confirmation of this trust relationship" alleged to be found in the document of 29th June, 1940, I agree with Ong Ag.C.J. In my opinion, it is worthless. Quah Ooi Chim (P.W.3), who wrote it, had admitted that, in a material particular, "It does not represent the true facts." Moreover, as evidence of a trust affecting the palm oil lands the document is worse than useless since on the date thereof, 29th June, 1940, it declared in clause 1 that "all businesses of Yew Hun Eng in Kluang and Singapore, the purchases of properties, etc.....were all undertaken on Yew Phaik Hoon's behalf", but in clause 2 "all these are now vested and returned to Yew Phaik Hoon ....". Had clause 2 borne any reference at all to the palm oil lands, these lands should have been vested and returned to the plaintiff on or before 29th June, 1940, whereas the palm oil lands were not transferred by Yew Hun Eng until 9th November, 1940.

As to the trust binding the defendants, it was alleged in the further and better particulars that "the request was oral", made "upon the acceptance by the defendants of the transfer of the properties into their names", and "the trust was oral and the request made about the time of the said transfer and before it was completed." On this point I quote the plaintiff's own evidence; which needs no further comment:

> "I came to know from people that the lands were in name of the two defendants just before issue of writ of summons. I did not transfer the land to the defendants nor did I permit any person to do so. My brother never consulted me about transfer of this property to the defendants. He never told me he had transferred the land to defendants."

Neither the statement of claim nor the further and better particulars had been amended. Consequently, the plaintiff's claim, as it stands, must fail. Even if the defendants had offered no evidence, there could have been no other result. It never was the duty of the defendants to answer any case which was not pleaded against them. On this ground alone I am satisfied that this appeal should succeed.

However, as this case is likely to go further, I shall proceed to deal with the other relevant points. With respect, I agree with the findings of primary facts stated by Ong Ag.C.J. in his judgment. He has dissected, analysed and accurately set out all relevant facts and events. On the basis of those primary facts, not forgetting the surrounding circumstances, which become relevant when one has to look into the affairs of a Chinese family, I think he was correct in his reasoning and inferences. After all, Ong Ag.C.J. is not only a "very experienced judge", as the learned Lord President declared in a recent case, but he is also of the same race as the parties and thus better able to read the Chinese mind. Although the entire ground has already been adequately covered in his judgment, I think it will not be out of place to add a few of my own observations.

We are considering the affairs of a family which at all relevant times was a well-knit one. The father was the man of business; he was solely at the helm, even though, while under the disabilities of a bankrupt, he had to do so under cover. What went on during this period was thus described by the plaintiff herself:

> "My husband wanted to borrow money from my mother. She mortgaged her property to raise the money. She lent the money to my husband. He used the money for his business and saw-mills. By that time my brother had already come here. The business was put into my brother's name."

Coming from the mouth of the plaintiff herself I am well satisfied that those few words contained a large substratum of truth. Although illiterate and blind in recent years, I am satisfied, on going through her evidence, that her mental faculties were by no means impaired on account of old age. If there was any appearance of confusion, I do not think it was at all due to the cross-examination, but rather to her reluctance to tell the whole truth.

The fact of the matter is that all her life she was content to leave the entire management of business affairs in her husband's capable hands. As the events proved he was worthy of her confidence. Such being the case, it was only natural that no question could ever have arisen, whether during or after his bankruptcy, requiring any clear distinction to be drawn between property that was his and hers respectively. A false front had been found in the person of Yew Hun Eng. Sheltered by his name, no embarrassing inquiries could arise from any quarter for going behind his nominal title. Yew Hun Eng was paid a salary. Yet there was no evidence that his sister not Quah Hong Chiam, was his employer. After Quah Hong Chiam s discharge, he took over all the existing enterprises and Yew Hun Eng retired to Penang, having outlasted his usefulness. The plaintiff's husband thereafter distributed his property among various members of his family. The plaintiff herself had no say in the distribution whatever and it is to be noted that one of the beneficiaries was the other wife of Quah Hong Chiam whom the plaintiff had no obligation to provide for.

Regarding such distribution of property, I would observe that all the disposals and transfers only took place after, and not before, Quah Hong Chiam's discharge from bankruptcy in 1938. Hence I do not agree that it would be in accord with the evidence to say that from time to time pieces of land were acquired during Quah Hong Chiam's business career which would appear to have been regarded as family property but which

were registered in the names of individual members of the family. The learned trial judge on this point took the view that

"there seemed to be an idea in the family that the land must be registered in the land office in the name of whoever was to look after the property."

Such being the case he therefore accepted the evidence of the plaintiff, her husband and her eldest son

"that when this property was transferred to the two defendants after the departure of Yew Hun Eng to Penang, the two defendants were to hold the property in trust for her."

I have anxiously examined the evidence, but with the greatest respect, I think that whatever evidence there is on this point came only from Quah Hong Chiam, who is interested in seeking to recover the palm oil land, and from Quah Ooi Chim who stands, in the event, to gain very considerably. Furthermore, such a conclusion is contradicted, first by the evidence of Quah Ooi Chim himself who said of the three houses registered in his name,

"Legally the property would be mine. On death of my father the houses are mine legally and no death duty would be paid."

Secondly, Lim Phien, the first wife of Quah Hong Chiam, was given the house she resides in, and according to Quah Hong Chiam himself, it was his gift to her: to quote his own words:

"That is the only property my first wife got.... I thought if anything should happen to me it would be bad to leave her without a house."

Thirdly, the Yew Phaik Hoon Rubber Estate was acknowledged to be the plaintiff's own property, though originally it was Quah Hong Chiam's. Yet this estate was not transferred to her for the alleged reason that "land must be in the name of whoever was to look after the property," because she was incapable of managing it.

Before I conclude, I shall touch briefly on two other points. As regards the $10,000 mortgage, it was transferred by the bank as mortgagees to Quah Hong Chiam on 12th May, 1941 and Quah Hong Chiam was finally paid off on 28th February, 1956. This is indisputable proof that the $10,000 was never used in the manner alleged by the plaintiff. Quah Ooi Chim (P.W.3) who claimed to know so much about everything had no explanation to offer.

Finally, on a question of law, I do not think that English authorities, whether on a gift by a mother to a child, or a gift to a stepson, can apply to the affairs of a polygamous Chinese family. Chinese family custom is manifestly different from English ways. For my own part I am also satisfied that, on the facts, a gift of the palm oil estate must have been made to the defendants, unencumbered by a trust in any form. It is true that the father, or the Johore Lumbering Company on his instructions, financed the development of this estate, but he was clearly in a position to protect his investment or advances by collecting repayments, as he in fact did. Any moneylender or finance company lending moneys for similar purposes cannot lay claim to beneficial ownership of the developed property on that account. Hence I cannot see why the father or mother should have any better right. Retention of title deeds by a creditor, by way of security, is in my view, a sufficient explanation for the defendants leaving the titles in the custody of the parent or parents, especially as the parties were on good terms.

I would allow this appeal, set aside the order of the court below, and dismiss the claim with costs.

Appeal allowed.

Solicitors: *L. M. Ong; Leicester & Chen.*

RE DING DO CA, DECD.

[F.C. (Thomson L.P., Ong Hock Thye Ag.C.J. (Malaya) and MacIntyre J.) May 20, 1966]

[Ipoh — Federal Court Civil Appeal No. 61 of 1965]

Chinese marriage — Validity of — Whether Chinese who has married under Christian Marriage Enactment (F.M.S. Cap. 109) could contract a polygamous marriage according to Chinese custom — Distribution Enactment (F.M.S. Cap. 71).

The deceased had in 1923 married one Madam Wong under the Christian Marriage Enactment and subsequently in 1937 he went through the form of marriage according to Chinese custom with Madam Ngoi. After his death Madam Wong applied for and obtained letters of administration to his estate; subsequently Madam Ngoi and her children commenced the action against Madam Wong and sought declarations that she was the widow of the deceased and that her children were his lawful children. Ali J. gave judgment in favour of Madam Ngoi and her children ([1966] 1 M.L.J. 6) and against that decision Madam Wong and her children appealed.

Held: (1) in regard to persons of the Chinese race the courts have given judicial recognition to certain customs which have been imputed to such persons and under such customs Chinese can contract a polygamous marriage;

(2) there is nothing in the Christian Marriage Enactment which renders a party who has married under it incapable during its continuance of contracting a polygamous marriage and therefore in this case the deceased could contract a valid marriage with Madam Ngoi, despite his earlier marriage with Madam Wong under the Christian Marriage Enactment.

Cases referred to:—

(1) *Dorothy Yee Yeng Nam* v. *Lee Fah Mooi* [1956] M.L.J. 257.

(2) *Re Loh Toh Met decd.* [1961] M.L.J. 234.

(3) *Mehta* v. *Mehta* [1945] 2 All E.R. 690.

(4) *Lindo* v. *Belisario* 1 Mag. Con. 216, 220.

(5) *Abdul Messih* v. *Farra* 13 App. Cas. 431, 437.